preme Court. The Charterer is really petitioning for a further hearing. It has had 5 hearings already.

3. In view of the arbitration agreement upon which the suit turns, there is no question of general law herein of importance which is in the public interest to have decided by this court of last resort.

4. The argument of petitioner that Certiorari should be granted is academic. Were this court to grant the petition and reverse, the only result would be that notice of arbitration would have to be redelivered by a method approved by petitioner's cases. The accomplishment of an academic result has not been the traditional role of this court.

POINT I

The Charterer has no cognizable sovereign immunity with respect to the within commercial transaction.

Fantastic, incredible it is that the Charterer should approach this high court in the guise of a citizen wishing to avoid a court decision which would "complicate or embarass the conduct of *our* foreign relationships or invite retaliation from foreign courts with respect to agencies of the United States operating abroad"? This artificial addiction of the Charterer to the well being of our foreign policy merely emphasizes its chameleon-like posturing.

The Charterer has changed its position many times since it was first encountered by the Shipowner upon the field of Commerce. In the first instance, at the time of the signing of the charter party, it was a purchase directorate astutely doing business in the world commodity market. Later, after some malfeasance on its own part, it became the Kingdom of Greece, a sovereign entitled to immunity first developed in ancient times, when trade and commerce were beneath the dignity of Kings. Now before this Court it appears in the first person language of a U. S. citizen consecrated to the purification of the Federal Rules of Civil Procedure and to the solemn instruction of the State Department. The Charterer poses as the protector of the foreign rela-

tions of the United States even though in the District Court the Department of State refused to advise the District Court that the Charterer was entitled to a sovereign immunity defense.

District Judge Feinberg in compliance with the suggestion of this Court afforded the United States an opportunity to present its arguments. The United States through the Department of Justice by letter from John W. Douglas, Assistant Attorney General, declined the invitation, stating:

> "The Department has carefully considered your invitation to submit an *amicus curiae* brief in this litigation. As you know, we filed such a brief in this case before the Court of Appeals, at the request of that court. Following the remand of this case by the Court of Appeals, that court rendered its decision in *Victory Transport, Inc.* v. *Comisaria General* (No. 28636, September 9,. 1964), which involves circumstances that appear to be identical to those of the present case. Accordingly, the discussion in that case concerning sovereign immunity would seem to be applicable here and to govern this case.
>
> "The Department having expressed its views in the Court of Appeals brief and that court having authoritatively spoken on the subject of sovereign immunity in the *Victory Transport* case, I am of the opinion that this Department could add nothing that would be of constructive assistance to this Court" (Resp. 31a).

The case at bar and the *Victory Transport* decision manifests not only the long continuity of legal precedent but also the evolutionary nature of a proper administration of justice. The decision represents an ever increasing restriction on the comity of sovereign immunity in nearly perfect equipoise with the expanding commercial activities of foreign governments.

Regardless of the broad and feckless argument of the Charterer, the only imaginable distinction between this case and the *Victory Transport* case is the manner of notice by mail, i.e., regular mail as against registered mail.

POINT II

The Court below properly found jurisdiction was created by the agreement to arbitrate and it did not depend upon service. Service as such was required merely for the purpose of notice and that function was performed.

Charterer would use the failure of Rule Four of the Federal Rules of Civil Procedure to provide for service on a commercial office of a foreign state to be a technical anomaly preventing the effectuation of the State Department's refusal to grant sovereign immunity in this case.

The prolonged and sophistic argument of the Charterer creates an unwarranted confusion when considered against the opinion of the Second Circuit Court of Appeals below. That Court properly divided the elements of process into its duplex purposes, i. e., subjection to jurisdiction and notice. The Court in brief held that the jurisdiction requirement of process had been met by the Charterer's agreeing to arbitrate in New York and that by so doing he "makes himself as amenable to suit as if he were physically present in New York." With respect to the notice aspect of service and the *casus omissus* in the F.R.C.P. the Court below correctly stated:

> "And when there is no Federal Rule, and no local rule, the court may fashion one not inconsistent with the Federal Rules" (Pet. 8a).

Charterer, though feigning concern for the Federal Court system, in reality bemoans the Second Circuit's ability to accomplish substantial justice in spite of Charterer's technical ploy with respect to the method of notice. To those brought up to believe that for every right, a remedy, the opinion of the Second Circuit is the *Beau Ideal.* Judge Murphy in the companion case, *Victory Transport, Inc.* v. *Comisaria General Etc.,* 232 F. Supp. 294, also put his finger on the thrust of "process" when he stated at page 295:

> "By entering into an agreement for arbitration in New York, the parties consented to New York's jurisdiction. Thus service of process became significant only to the extent that it was required so as to avoid a violation of due process."

It is respectfully submitted that the stipulation of counsel as well as the affidavits of mailing of the motion papers, the receipt of which is stipulated to, represent a more than adequate compliance with the notice requirements of due process. In the instant case, the service of process was not necessary in a technical jurisdictional sense since the Charterer by the arbitration contract agreed to the jurisdiction of the court.

As was held in the case below and in *Victory Transport,* what remained to be done and what was done by the Shipowner was the giving of fair notice. This the Charterer cannot deny, for it has never been heard to deny the receipt of the various notices both directly and through its counsel.

POINT III

Even if the rationale of the Court below were otherwise, objections to process have been long since waived.

The Charterer has admitted receipt of the petition and notice of motion. These were sent by mail to (1) Ministry of Commerce, State Purchase Directorate, c/o Greek Government Foreign Trade Administration; (2) Messrs. Becker & Greenwald, proctors for the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, Washington, D. C.; and (3) Kingdom of Greece, Ministry of Commerce, Purchase Directorate, New York, New York (Resp. 7a, 8a, 9a).

The Courts below, properly reviewing the stipulations of counsel and recognizing the principles of process as enunciated in *Victory Transport,* i.e., the duplex purpose of jurisdiction and notice, decided as a fact that Charterer

consented beforehand to the jurisdiction of the District Court (Pet. 5a, 17a). Apparently, further relying on the stipulation of counsel, the District Court found that the notice function had also been performed.

That Court in so ruling held:

> "In this case, as in *Victory Transport,* respondent has consented beforehand to the jurisdiction of the district court, and the notice function of process has been performed." (Pet. 17a).

The United States through the Department of Justice obviously supported the view of District Judge Feinberg, since at the time the arguments of the United States were solicited by Judge Feinberg, the claim of Charterer that the service was invalid had already been raised. The United States referred to the *Victory Transport* case in which the court said (336 F. 2d at 364):

> "The appellant has also challenged the propriety of the extraterritorial service employed here. But since the appellant [h]as consented beforehand to the jurisdiction of the district court, the sole function of process in this case was, as Judge Murphy correctly noted below, to notify the appellant that proceedings had commenced. This function was certainly performed. Moreover, similar service of process on nongovernmental foreign corporations was held sufficient in the Farr and Orion cases, supra. No rule of international law requires special treatment for serving branches of foreign sovereigns. . . ."

The findings of Judge Feinberg are a correct basis for factually deciding there to be sufficiency of process. However, in further support of the correctness of the ruling, the Shipowner points to the Federal Rules of Civil Procedure, particularly Rule 12(b) which covers insufficiency of service of process. F.R.C.P. 12(h) read with F.R.C.P. 12(b)

above certainly disposes of the Charterer's tardily raised contention. Rule 12(h) reads:

> "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply . . .".

The word "tardily" is used advisedly with respect to the untimeliness of Charterer's objection to the service of process. The original motion herein was returnable on January 29, 1963 but was adjourned twice by stipulation of counsel. First on January 28, 1963, and later on February 4, 1963, it was adjourned to February 19, 1963, the date when it was finally argued before Judge Dawson. No contention of insufficiency of service of process was raised on the initial motion or at any time between the original notice of motion through the reargument in the Second Circuit Court of Appeals in February, 1964. Throughout the period stated above, the sole argument of the Shipowner with respect to jurisdiction was that which depended on sovereign immunity. The fact that sufficiency of process was not raised by the Charterer is conceded in Charterer's letter of May 4, 1964:

> "We had not previously urged that this case should be dismissed because of improper service, although the point of the propriety of service was raised by [Shipowner] in its reply brief . . ." (Resp. 33a).

The waiver resulting from such a course of action was treated with by the late District Judge Edward Conger of the United States District Court for the Southern District of New York in *P. Beiersdorf & Co., Inc.* v. *Duke Laboratories, Inc.*, 10 F.R.D. 282 (1950), when he found that the objection to service of process had been waived:

> "I am of the opinion, however, that the defendant has waived such defect. Rule 12(h) of the Federal

> Rules provides for waiver of all defenses and objections which are not presented by motion nor in the answer or reply, with certain exceptions. 'If a party makes a motion under Rule 12 and omits therefrom some defense or objection which could have been included, he may not thereafter make a motion based on such defense or objection * * * nor, under subdivision (h), may he raise the defense in his answer, unless it comes within one of the exceptions in (h).' Moore's Federal Practice, 2d Ed., p. 2327.
>
> "After the summons and complaint had been served in the defective method mentioned, the defendant notices the instant motion without any objection to the service of process, although the facts with respect thereto were alluded to in an affidavit accompanying the motion papers. At the time of the argument he raised the point. But this was long after the time for which the motion was originally noticed and after the plaintiff had served an amended complaint purporting to correct the defects suggested by the defendant's motion with respect to the original complaint."

The first above-mentioned stipulation adjourning the motion was signed by the attorneys for the Kingdom of Greece without reservation or allusion to lack of authority to act for their client. The legend on the stipulation reads as follows:

> "Becker and Greenwald, Proctors for the Kingdom of Greece, Ministry of Commerce, Purchase Directorate" (Resp. 34a).

Only in the second stipulation did the attorneys, who now complain of insufficiency of process, begin dominating themselves as "appearing specially".

While the effect of Rule 12 is to make unnecessary the age-old technical distinction between a general and a special appearance, the reason for the former distinction remains.

In up-dating the Federal practice, the rule makers recognized the evil sought to be prevented by the old special appearance distinction and skillfully thwarted the confusing effect of tardily raised objections to service of process. Rule 12(h) of the Federal Rules of Civil Procedure denominates as waiver the failure by a party to timely present its defenses or objections.

In this connection Judge Bailey Aldrich stated in *Emerson* v. *National Cylinder Gas Co.*, 131 F. Supp. 299 (D. C. Mass. 1955), that while with a general appearance a defendant can still contest jurisdiction over the person, that contest must be timely raised.

Charterer, in the Court below sought to circumvent its waiver by showing it had raised service of process questions on remand, but its objection on remand cannot revive a waiver. The very first appeal herein, when taken, deprived the Trial Court of the power of amendments of pleadings. *Braiser* v. *United States*, 229 F. 2d 176 10th Cir. (1956) *cert. denied* 351 U.S. 925.

On remand of the case at bar the instructions were not for the District Court to accept new pleadings or motions with respect thereto, but were simply "to take such evidence as is relevant to the contentions of the parties and to make a further determination in the light thereof . . . ".

It is respectfully submitted that objections to service of process by the Charterer not made in the first instance in the District Court, could not properly be raised on the first appeal and were not authorized by the mandate. The Charterer argued in the Court below that because in the second hearings on mandate it raised the question of service of process, those questions are a proper subject for appeal because the Shipowner, by permitting this technical objection to be raised at the second hearing without contest, had waived its objection to that question being raised on the second appeal.

It is respectfully submitted that such an argument if accepted would constitute a new legal theory — "waiver of waiver". In fact, the Charterer waived its objection to the

service of process at the first hearing and forever after must be deemed bound by that waiver, for jurisdiction, if it were lacking, attached at once and could not be detached a year later on the remand.

CONCLUSION

In this case no questions of subject matter jurisdiction or of venue are presented. The jurisdiction depended on the agreement of the Charterer and the Shipowner. In the case *National Rental* v. *Szukhent,* 375 U.S. 311 (1964) this court held at pages 315, 316:

> "And it is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether. (Citing cases)."

In view of the foregoing, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ELI ELLIS,
Counsel for Respondent
No. 26 Broadway
New York, N. Y. 10004

ROBERT W. MULLEN,
Of Counsel.

Notice of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 142

In the Matter

of the

Petition of Petrol Shipping Corporation, as Owner of the tanker ATLANTIS, for an order directing the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, charterer of said vessel, to proceed to arbitrate in accordance with the terms of its written agreement.

Sirs:

PLEASE TAKE NOTICE that upon the annexed petition, the undersigned will move this Court pursuant to Section 4 of the Arbitration Act (9 U. S. C. A. 4), at a stated term for the hearing of motions in the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 29th day of January, 1963 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order directing the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, to proceed to arbitration in accordance with the terms of its agreement, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: New York, N. Y.
January 10, 1963.

Yours, etc.,

HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE,
Proctors for Vessel Owner-Petitioner,
26 Broadway,
New York 4, N. Y.

Notice of Motion

To:

BECKER & GREENWALD,
Proctors for the
KINGDOM OF GREECE,
MINISTRY OF COMMERCE,
PURCHASE DIRECTORATE,
839—17th Street, N. W.,
Washington 6, D. C.

To:

KINGDOM OF GREECE,
MINISTRY OF COMMERCE,
PURCHASE DIRECTORATE,
30 Rockefeller Plaza,
New York 20, N. Y.

To:

MINISTRY OF COMMERCE,
STATE PURCHASE DIRECTORATE,
c/o GREEK GOVERNMENT,
FOREIGN TRADE ADMINISTRATION,
2211 Massachusetts Avenue, N. W.,
Washington, D. C.

Petition to Compel Arbitration

[SAME TITLE]

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of Petrol Shipping Corporation as Owner of the Tanker *Atlantis,* for an order directing the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, as Charterer of said vessel, to proceed to arbitration in accordance with the terms of its written agreement, respectfully shows to this Court, and alleges upon information and belief:

1. At all material times petitioner was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware and the owner of the Tanker *Atlantis,* and at the time of the agreement referred to herein was doing business within this District.

2. At all material times, respondent, Kingdom of Greece, Ministry of Commerce, Purchase Directorate, was engaged in business in the State of New York and has an office and place of business at 30 Rockefeller Plaza, New York, N. Y.

3. On or about February 12, 1960, in the City of New York, petitioner and respondent entered into a written charter party agreement which provided for the Tanker *Atlantis* to be chartered for a voyage from Houston, Texas and Baton Rouge, Louisiana to Piraeus, Greece, carrying a cargo of grain. The vessel pursuant to said charter proceeded to the port of Piraeus and at said port to a berth designated by the respondent. The said berth designated

by the respondent was not one at which the vessel could properly and safely lie afloat and as a result thereof the vessel suffered severe and serious damage.

4. The libellant as a result of the unsafe berth furnished by the respondent suffered damages of approximately $287,000, as best as can presently be ascertained, no part of which has been paid although duly demanded.

5. The aforesaid charter party contains the following clause:

> "ARBITRATION CLAUSE NEW YORK: Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

Pursuant to the aforesaid provision, petitioner has designated Mr. R. V. Everett as its arbitrator, and hereby demands that respondent name an arbitrator in accordance with the terms of its written agreement.

6. Section 4 of the Arbitration Act (9 U. S. C. A. 4) provides that in case of failure or refusal of another party to arbitrate under a written agreement to do so, the aggrieved party may petition the District Court for an order directing that such arbitration proceed in the manner provided for in such agreement.

7. Petitioner, under date of September 29, 1961, served upon the respondent a notice calling for arbitration in accordance with the provisions of the charter as set forth above and in such notice set forth the damages claimed

and the arbitrator designated by the petitioner. Respondent having failed to reply to the aforementioned demand under date of December 15, 1961, petitioner made a further demand for the respondent to appoint its arbitrator. The respondent has failed to comply with petitioner's demands, all in violation of the charter provisions quoted above.

8. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, petitioner prays for an order directing respondent to proceed to arbitration in accordance with the terms of its written agreement, and for such other and further relief as to the Court may seem just and proper in the premises.

HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE,
Proctors for Vessel Owner-Petitioner.

Verification

SAME TITLE

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

E. C. STAMATIOU, being duly sworn, deposes and says:

That he is an officer, to wit: the Vice President of PETROL SHIPPING CORPORATION, that he has read the foregoing petition to compel arbitration and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; the reason this verification is made by deponent and not by petitioner is because petitioner is a corporation.

PETROL SHIPPING CORPORATION

By /s/ E. C. STAMATIOU

Sworn to before me this 10th day of December, 1962.

SIGMUND FAUST
Notary Public, State of New York
No. 31-1173750
Qualified in New York County
Commission Expires March 30, 1963

Affidavit of Service by Mail

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LILLIAN F. CLARK, being duly sworn deposes and says: That on the 10th day of January, 1963, she served the attached Notice of Motion upon Ministry of Commerce, State Purchase Directorate, c/o Greek Government Foreign Trade Administration, named therein, at 2211 Massachusetts Avenue, N. W., Washington, D. C., by depositing a true copy thereof securely enclosed in a post-paid wrapper in a Post Office box regularly maintained by the United States Government at No. 26 Broadway, New York 4, N. Y., directed to them at the last business address designated by them for that purpose upon the preceding papers in this action. Deponent is over the age of eighteen years.

LILLIAN F. CLARK

Sworn to before me this 10th day of January, 1963.

SIGMUND FAUST
Notary Public, State of New York
No. 31-1173750
Qualified in New York County
Commission Expires March 30, 1963

Affidavit of Service by Mail

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LILLIAN F. CLARK, being duly sworn deposes and says: That on the 10th day of January, 1963, she served the attached Notice of Motion upon Messrs. Becker & Greenwald, the proctors for the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, named therein, at 839—17th Street, N. W., Washington 6, D. C., by depositing a true copy thereof securely enclosed in a post-paid wrapper in a Post Office box regularly maintained by the United States Government at No. 26 Broadway, New York 4, N. Y., directed to said attorneys at the last business address designated by said attorneys for that purpose upon the preceding papers in this action. Deponent is over the age of eighteen years.

LILLIAN F. CLARK.

Sworn to before me this 10th day of January, 1963.

SIGMUND FAUST
Notary Public, State of New York
No. 31-1173750
Qualified in New York County
Commission Expires March 30, 1963

Affidavit of Service by Mail

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LILLIAN F. CLARK, being duly sworn deposes and says: That on the 10th day of January, 1963, she served the attached Notice of Motion upon Kingdom of Greece, Ministry of Commerce, Purchase Directorate, named therein, at 30 Rockefeller Plaza, New York 20, New York, by depositing a true copy thereof securely enclosed in a post-paid wrapper in a Post Office box regularly maintained by the United States Government at No. 26 Broadway, New York 4, N. Y., directed to them at the last business address within the State designated by them for that purpose upon the preceding papers in this action. Deponent is over the age of eighteen years.

LILLIAN F. CLARK.

Sworn to before me this 10th day of January, 1963.

SIGMUND FAUST
Notary Public, State of New York
No. 31-1173750
Qualified in New York County
Commission Expires March 30, 1963

Suggestion of Greek Ambassador of Lack of Jurisdiction by Reason of Sovereign Immunity

SAME TITLE

ALEXANDER A. MATSAS informs and suggests to this Honorable Court that:

1. He is the duly accredited Ambassador Extraordinary and Plenipotentiary of the Kingdom of Greece to the United States of America.

2. The Kingdom of Greece is a friendly foreign sovereign which is recognized by the United States of America.

3. The Kingdom of Greece is a sovereign not subject to suit in this Honorable Court without its consent, which, in this case it declines to accord.

4. The Kingdom of Greece hereby asserts its sovereign immunity to suit in this action.

Wherefore the undersigned, appearing specially for the Kingdom of Greece and without submitting its rights to the jurisdiction of this Honorable Court, respectfully suggests that this Honorable Court lacks jurisdiction over the subject matter of this action and over the Kingdom of

Suggestion of Greek Ambassador of Lack of Jurisdiction by Reason of Sovereign Immunity

Greece or its property, and respectfully prays for an order dismissing this action for lack of jurisdiction.

/s/ A. MATSAS,
Ambassador Extraordinary and Plenipotentiary of the Kingdom of Greece to the United States of America.

Dated: January 29th, 1963.

ARTHUR M. BECKER,
Counsel for the
Kingdom of Greece,
appearing specially
only for the purpose
of presenting the
foregoing suggestion.

Office and P. O. Address:

80 Broad Street,
New York, N. Y.

[SEAL]

Affidavit of A. D. Sismanidis in Opposition to Motion

DISTRICT OF COLUMBIA) ss.

A. D. SISMANIDIS, being duly sworn, deposes and says:

1. I am the Director, Office of Foreign Trade Administration, Ministry of Commerce, Kingdom of Greece.

2. The Kingdom of Greece is a party to an Agreement with the United States of America providing for the sale of surplus agricultural commodities to the Kingdom of Greece, under the authority of Title I of Public Law 480 (Act of July 10, 1954, 68 Stat. 455, 7 U. S. C. A. § 1701, *et seq.*). Pursuant to this Agreement, the United States Department of Agriculture issues procurement authorizations to the Greek Government authorizing grain purchases by the Greek Government.

3. In connection with the transportation of a cargo of grain purchased by the Greek Government in accordance with such a procurement authorization of the United States Department of Agriculture, the Greek Government Ministry of Commerce, on January 9, 1960, issued a Call for Ocean Transportation Bids to carry a Public Law 480, Title I bulk grain cargo from the United States to Greece. This Call for Ocean Transportation Bids requested that bids be filed with the Ministry of Commerce, State Purchase Directorate, Caningos Square, Athens, Greece; and incorporated terms and conditions of a Call for Ocean Transportation Bids, dated December 20, 1957, which provided that:

> "The respective contract of affreightment to be signed by the contracting parties shall be subject to the rules and regulations of the United States Department of Agriculture (U. S. D. A.) governing shipments under Title I of Public Law 480. Consequently, [sic.] the 50% at least, of the cargo shall be moved on U. S. Flag vessels."

Affidavit of A. D. Sismanidis in Opposition to Motion

4. Petrol Shipping Corporation, owner of the American Flag Tanker *Atlantis,* responded to the Greek Government's Call for Ocean Transportation Bids and a charter agreement was entered into between Petrol Shipping Corporation and the Ministry of Commerce, State Purchase Directorate of Athens, Greece, dated February 12, 1960, providing for the transportation on the Tanker *Atlantis* of the Greek Government's Public Law 480, Title I bulk grain cargo from Houston, Texas, and Baton Rouge, Louisiana, to Piraeus, Greece.

/s/ A. D. SISMANIDIS

DISTRICT OF COLUMBIA) ss.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 15th day of February, 1963.

/s/ PATRICIA ANNE DENNY,
Notary Public.

(SEAL)

Reply Affidavit of E. C. Stamatiou in Support of Motion

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

E. C. STAMATIOU, being duly sworn, states on information and belief as follows:

I am the Vice President of Petrol Shipping Corporation, the petitioner herein.

In this matter, the petitioner received a letter dated January 3, 1962 from the Ministry of Commerce of the Greek Government in Athens, the correct English translation of which is as follows:

"Ref. No.—253221/14835

"Re: Aribitrator for SS. *Atlantis*—Damages

"In reference to your letter of December 15, 1961, please be advised that by our letter No. 225568/12562-14/11/61, we have authorized the Greek Government Foreign Trade Administration in Washington, D. C. to nominate our arbitrator.

"We ask you, therefore, kindly to contact above agency."

Thereafter, the petitioner received a letter dated January 9, 1962 from the Office of the Foreign Trade Administration of the Ministry of Commerce in Washington as follows:

"Petrol Shipping Corporation
80 Broad Street
New York 4, N. Y.

"Attention: Mr. John L. Maroudis

"Re: s/ t *Atlantis*—C/P 2/12/60
Bottom Damage in berth at Piraeus
Greece—March 28, 1960

Reply Affidavit of E. C. Stamatiou in Support of Motion

"Gentlemen:

"Our principals, the Ministry of Commerce, State Purchase Directorate has referred to us your request to arbitrate your asserted $286,792.93 claim for grounding damages which you contend is for account of our principals.

"In order that we may become familiar with the validity of your claim and proceed forthwith, we would appreciate your promptly advising us the reason why you consider we should be held responsible for these charges."

Subsequent to the arrival of the *Atlantis* in Piraeus, Greece, the charterer filed a suit against the petitioner for an alleged damage suffered by the cargo in its carriage. This suit was instituted by the Ministry of Finance, acting for the Greek Government. That suit was later dropped, according to advices from the attorney acting for the vessel and the vessel underwriters.

E. C. STAMATIOU
E. C. Stamatiou

Sworn to before me this 18th day of February, 1963.

SIGMUND FAUST
Notary Public, State of New York
No. 31-1173750
Qualified in New York County
Commission Expires March 30, 1963

Shipowner's Exhibit B-1.

The letter of the Greek Ambassador requesting Sovereign Immunity of the State Department.

No. 5108/N/6.

The Ambassador of Greece presents his compliments to His Excellency Secretary of State and, on instructions from the Royal Government, has the honor to submit herewith to His Excellency's kind consideration a memorandum on a legal dispute between the Greek Government and Petrol Shipping Corporation, Delaware.

The Ambassador of Greece avails himself of this opportunity to renew to His Excellency the Secretary of State the assurances of his highest consideration.

September 30, 1964.

MEMORANDUM

(attached to the Note No. 5108/N/6 dated September 29, 1964, of the Royal Greek Embassy in Washington, D. C.)

The proceedings of the United States Courts in the dispute between Greece and Petrol Shipping Corporation, a Delaware Corporation, which arised from the acts taken by an agency of the Greek Government in Piraeus, Greece, are summarized as follows:

On January 14, 1963, Petrol Shipping Corporation, as owner of the tanker "Atlantis", petitioned the United States District Court for the Southern District of New York in No. 63 Civ. 142 for an order *directing* the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, as charterer of said vessel, to proceed to arbitration of a dispute under the charter arising from the carriage from Houston, Texas to Piraeus, Greece, of a cargo of bulk grain financed by the United States Government under Title I

Shipowner's Exhibit B-1.

under Public Law 480. Petrol Shipping Corporation alleged that the "berth (in the port of Piraeus, Greece) designated by the (Kingdom of Greece, Ministry of Commerce, Purchase Directorate) was not at which the vessel could properly and safely lie afloat and as a result thereof the vessel suffered severe and serious damage."

On February 18, 1963, the Ambassador of Greece in the United States appeared specially solely for the purpose of informing said court that the Kingdom of Greece is a sovereign state not subject to suit in said court without its consent which in this case it declined to accord. The Ambassador suggested that the said court lacked jurisdiction over the subject matter of the action and over the Kingdom of Greece or its property and respectfully prayed for an order dismissing the action for lack of jurisdiction.

On February 21, 1963, Honorable Orchie O. Dawson, United States District Judge, ordered that the Petition of Petrol Shipping Corporation be dismissed for lack of jurisdiction by reason of the sovereign immunity of the Kingdom of Greece.

On January 7, 1964, a panel of the Court of Appeals for the Second Circuit affirmed the judgment of the District Court dismissing the Petition of Petrol Shipping Corporation for lack of jurisdiction by reason of the sovereign immunity of Greece.

On May 25, 1964, the Court of Appeals for the Second Circuit sitting in banc on rehearing vacated the judgment of dismissal of the District Court and remanded the case to the District Court for further proceedings.

On August 12, 1964, the Honorable Sylvester J. Ryan, United States District Court Judge, ordered that the Kingdom of Greece and Petrol Shipping Corporation are "hereby directed to appear before the Honorable Wilfred Feinberg on October 5, 1964 and on such subsequent dates as Judge Feinberg shall direct."

On the 10th day of September, 1964, Judge Feinberg requested that counsel for the Kingdom of Greece and for

Shipowner's Exhibit B-1.

Petrol Shipping Corporation appear in his chambers for a pre-trial hearing on September 21, 1964. After the pre-trial hearing on September 21, 1964, Judge Feinberg adjourned further proceedings in the case until November 2, 1964, on order to allow the Kingdom of Greece an opportunity to obtain the views of the Department of State concerning the jurisdictional issues presented in the case. Attached hereto is a copy of the order of Judge Feinberg adjourning the Court's hearing of the case until November 2, 1964.

The assertion of personal jurisdiction by the United States courts over the Kingdom of Greece is contrary to established principles of international law governing the comity of nations.

1. The Kingdom of Greece protests the attempt to serve process of the courts of the United States upon the diplomatic representatives of the Kingdom of Greece. The attempt to serve process in this case was made by mailing copies of the notice of motion and petition of Petrol Shipping Corporation to the Ministry of Commerce, State Purchase Directorate of the Kingdom of Greece, c/o the Greek Government Foreign Trade Administration, 2211 Massachusetts Avenue, N. W., Washington, D. C. and to 30 Rockefeller Plaza, New York 20, New York.

The diplomatic representatives of the Kingdom of Greece to the United States cannot be regarded as "agents" of the Kingdom of Greece for the purpose of accepting service of process in personal suits against the Kingdom of Greece in the courts of the United States. This principle of international law has been expressed by the Department of State to the United States Court of Appeals for the District of Columbia in the suit of *Hellenic Lines, Limited, Appellant* v. *Luke C. Moore, U. S. Marshal, Appellee* (No. 18,265) in the Supplemental Brief for Appellee filed in August, 1964.

It is requested that the Department of State express to the United States District Court for the Southern District

Shipowner's Exhibit B-1.

of New York sitting in *Petrol Shipping Corporation* v. *Kingdom of Greece, Ministry of Commerce, Purchase Directorate,* the same views it expressed in the *Hellenic Lines* case, namely, that personal service of process of a United States court cannot be made upon the Kingdom of Greece by mailing copies thereof to the diplomatic or other representatives of the Kingdom of Greece situated within the United States.

2. The petition of Petrol Shipping Corporation seeks an order of the United States District Court directing Greece to arbitrate in New York a dispute between Petrol Shipping Corporation and the Kingdom of Greece. The Kingdom of Greece is an independent sovereign state not subject to direction by the courts of the United States. It is requested that the Department of State advise the United States District Court for the Southern District of New York sitting in *Petrol Shipping Corporation* v. *Kingdom of Greece, Ministry of Commerce, Purchase Directorate,* that the Kingdom of Greece is not subject to direction by the courts of the United States without its consent.

3. All of the actions complained of in the pending suit were taken by the agencies of the Kingdom of Greece within the territory of the Kingdom of Greece. Petrol Shipping Corporation alleges that its vessel was damaged by an act of an agency of the Kingdom of Greece which, in the Port of Piraeus, directed the vessel to a berth that Petrol Shipping Corporation alleges was unsafe. Under established principles of international law the courts of the United States cannot sit in judgment of the acts of the Kingdom of Greece done within its own territory.

It is requested that the Department of States express to the United States District Court for the Southern District of New York in *Petrol Shipping Corporation* v. *Kingdom of Greece, Ministry of Commerce, Purchase Directorate* that the Kingdom of Greece is not required to answer

in the courts of the United States for actions which it took within its own territory in the port of Piraeus, Greece.

4. Under the laws of the Kingdom of Greece the courts of the Kingdom of Greece are open to Petrol Shipping Corporation for the purpose of seeking an adjudication of its alleged claim against the Kingdom of Greece. It is the view of the Greek Government that the adjudication of Petrol Shipping Corporation's claim should take place in the Kingdom of Greece where all acts complained of took place and where all witnesses of such acts are readily available to aid the true and just adjudication of the claim of Petrol Shipping Corporation.

The Government of Greece is of the opinion that the claim of Petrol Shipping Corporation lacks any basis in fact or in law. Suit was brought against the Kingdom of Greece in New York only for the purpose of seeking a determination of the dispute between Greece and Petrol Shipping Corporation in a place far distant from the scene of the acts complained of and far distant from the port of Piraeus, Greece where all of the witnesses on behalf of the Kingdom of Greece are readily available, thereby placing the Kingdom of Greece at substantial disadvantage in defending an unfounded claim.

Accordingly, it is requested that the Department of State assist the Government of Greece in seeking dismissal of the said suit of Petrol Shipping Corporation by the United States District Court for the Southern District of New York.

Shipowner's Exhibit B-3.

The Reply of the State Department.

The Secretary of State presents his compliments to the Chargé d'Affaires ad interim of Greece and refers to the Ambassador's note No. 5108/N/6 dated September 30, 1964, requesting consideration of an attached Memorandum concerning the case of *Petrol Shipping Corporation* (Petitioner) v. *The Kingdom of Greece, Ministry of Commerce, Purchase Directorate* (Respondent), now pending in the United States District Court for the Southern District of New York.

The basic facts appear to be: that the respondent chartered the petitioner's tanker "Atlantis" to carry grain from Houston, Texas to Piraeus, Greece, the grain having been financed by the United States Government under Title I, Public Law 480; that the berth in the port of Piraeus, Greece, designated by the respondent was not one at which the vessel could properly and safely lie afloat and as a result thereof the vessel suffered damage; and that the charter party contained an arbitration clause and petitioner seeks an order directing the respondent to proceed to arbitration in accordance therewith. The District Court pursuant to an application of the respondent granted an adjournment of the case to permit respondent to present a claim of foreign sovereign immunity to the Department of State. The Memorandum makes several requests, the net effect of which is for recognition of sovereign immunity from suit for the respondent.

As the Embassy is probably aware, it is the practice of the Department of State when considering requests for recognition of sovereign immunity from suit by foreign governments to follow the policy set forth in its letter of May 19, 1952, to the Acting Attorney General, the so-called Tate letter, a copy of which is enclosed. Applying that policy to the facts in the case under consideration, the Department sees no basis for any conclusion other than that the acts on which the suit is based are private acts

Shipowner's Exhibit B-3.

(*jure gestionis*). In these circumstances, the Department regrets that it is unable to comply with the request of the Ambassador of the Kingdom of Greece for recognition of sovereign immunity from suit in the instant case.

It follows that the other questions raised by the Memorandum attached to the Ambassador's note are matters for the Court.

Enclosure:

To Acting Attorney General,
May 19, 1952.

Department of State,
Washington,

TP 12 US-GREECE

DEPARTMENT OF STATE
Washington

May 19, 1952

My dear Mr. Attorney General:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

Shipowner's Exhibit B-3.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (displomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The Honorable

PHILIP B. PERLMAN,
Acting Attorney General.

[Published in *Department of State Bulletin*, Vol. 26, pp. 984-5, June 23, 1952.]

Shipowner's Exhibit B-3.

The position of the Netherlands, Sweden and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school influential writers favoring the restrictive theory

and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest in this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom, little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long estab-

Shipowner's Exhibit B-3.

lished policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:

JACK B. TATE
Acting Legal Adviser

Shipowner's Exhibit B-2.

Letter, Dated October 5, 1964.

October 5, 1964.

Office of the Secretary of State
Department of State
Washington, D. C.

Attention of Raymond T. Yingling, Esq., Legal Adviser

Re: Petrol Shipping Corporation—Kingdom of Greece, Ministry of Commerce, Purchase Directorate.

Dear Sirs:

We confirm our advices that we represent Petrol Shipping Corporation, a corporation organized under the laws of the State of Delaware, which has instituted a proceeding in the United States District Court for the Southern District of New York to compel the Ministry of Commerce, Purchase Directorate, of the Kingdom of Greece, to comply with its agreement, contained in a Charter Party executed in the United States, to arbitrate a dispute involving damage suffered to the Tanker *Atlantis*.

We have received a copy of the documents dated September 30, 1964, submitted by the Ambassador of Greece to the Secretary of State, purporting to set forth the facts involved, with a request that the Secretary of State assist the Ambassador of Greece in his efforts to have the aforementioned proceeding in the United States District Court dismissed. We submit that the facts in this case clearly demonstrate that the same involve a purely commercial transaction and therefore the request by the Ambassador of Greece for intervention by the Secretary of State should properly be denied.

The dispute arises out of a commercial Charter for a United States vessel, entered into in the United States,

Shipowner's Exhibit B-2.

for the carriage of cargo from a United States port to Greece. The vessel suffered damage as a result of an unsafe berth being furnished to the vessel. The Charter contains a specific agreement by the Kingdom of Greece to arbitrate in New York any disputes arising under the Charter, and that the determination of the arbitrators shall be made a rule of Court. This clearly is a pure and simple commercial transaction and therefore, in accordance with the applicable International Law and the principles previously outlined by the Department of States in the "Tate" letter, the plea of sovereign immunity should be denied.

The Ambassador of Greece, in the memorandum referred to above, attempts to avail himself a ruling in *Hellenic Lines Limited* v. *Luke C. Moore, U. S. Marshal,* presently on appeal in the United States Court of Appeals for the District of Columbia, as a basis for intervention by the Secretary of State. We respectfully submit that the *Hellenic Lines* case is in no way controlling on this particular case, since in the *Hellenic Lines* case there was no agreement to arbitrate disputes or submit to jurisdiction of a United States Court. Thus, the question of service of process is not a true issue in our case, and in support thereof we refer to the recent decision of the United States Court of Appeals for the Second Circuit in *Victory Transport Incorporated* v. *Comisaria General De Abastecimientos Y Transportes,* a copy of which is enclosed for your convenience.

The Second Circuit in the foregoing case, which is analogous on its facts to this case, has sustained jurisdiction over a Department of the Spanish Government and required it to proceed with arbitration as agreed in a Charter Party, stating as follows on the issue of service of process:

> "The appellant has also challenged the propriety of the extraterritorial service employed here. But since the appellant has consented beforehand to the

Shipowner's Exhibit B-2.

jurisdiction of the district court, the sole function of process in this case was, as Judge Murphy correctly noted below, to notify the appellant that proceedings had commenced. This function was certainly performed. Moreover, similar service of process on nongovernmental foreign corporations was held sufficient in the *Farr* and *Orion* cases, *supra*. No rule of International law requires special treatment for serving branches of foreign sovereigns. See *Sucharitkul, supra,* at 350, 351."

We see no need in view of the foregoing to bring to the attention of the Secretary of State the additional facts which are in conflict with statements contained in the memorandum submitted by the Ambassador of Greece, since we respectfully submit that based upon the foregoing the Secretary of State should decline the request by the Ambassador of Greece to intervene in this proceeding. However, in the event the request is not summarily declined, then we request an opportunity to be heard so that we may submit such additional facts and arguments as we deem appropriate.

Very truly yours,

HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE

By /s/ ELI ELLIS

EE:G

Shipowner's Exhibit B-4.

Letter, Dated October 15, 1964.

DEPARTMENT OF STATE

WASHINGTON

October 15, 1964

In reply refer to
L/SFP

HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE,
26 BROADWAY,
NEW YORK, NEW YORK.

Sirs:

In response to your letter of October 5, 1964, indicating your interest as representatives of the petitioner in *Petrol Shipping Corporation* v. *Kingdom of Greece, Ministry of Commerce, Purchase Directorate,* in the request of the Ambassador of Greece for recognition of sovereign immunity from suit of the respondent in the said case, you are informed that the Department has declined to recognize such immunity because in its view the acts out of which the case arises must be regarded under the restrictive theory of sovereign immunity followed by the Department as private acts (*jure gestionis*).

Very truly yours,

For the Secretary of State:

s/ RAYMOND T. YINGLING
Assistant Legal Adviser

Letter to Court, Dated November 18, 1964.

November 18, 1964

118982-106

DEPARTMENT OF JUSTICE.

Honorable WILFRED FEINBERG
United States District Judge
United States Court House
Foley Square
New York, New York 10007

Dear Judge Feinberg:

This has reference to your letter of November 2 concerning *Petrol Shipping Corp.* v. *Greece* (S. D. N. Y. 63 Civ. 142).

The Department has carefully considered your invitation to submit an *amicus curiae* brief in this litigation. As you know, we filed such a brief in this case before the Court of Appeals, at the request of that court. Following the remand of this case by the Court of Appeals, that court rendered its decision in *Victory Transport, Inc.* v. *Comisaria General* (No. 28636, September 9, 1964), which involves circumstances that appear to be identical to those of the present case. Accordingly, the discussion in that case concerning sovereign immunity would seem to be applicable here and to govern this case.

The Department having expressed its views in the Court of Appeals brief and that court having authoritatively spoken on the subject of sovereign immunity in the *Victory Transport* case, I am of the opinion that this Department could add nothing that would be of constructive assistance to this Court.

Sincerely yours,

s/ JOHN W. DOUGLAS
Assistant Attorney General

cc: State Department
Arthur Beck, Esq.
Eli Ellis, Esq.

Letter, Dated May 4, 1964.

BECKER & GREENWALD

Attorneys at Law

839 - 17th Street, N. W.
Washington 6, D. C.

—

Sterling 3-8775

—

Cable "Becker"

May 4, 1964

Our File No. 190.2

The Honorable, the Judges of the United States
Court of Appeals for the Second Circuit

United States Courthouse
Foley Square
New York, New York 10007

Re: Petrol Shipping Corporation *v.* The Kingdom of Greece, Ministry of Commerce, Purchase Directorate No. 28188, on rehearing *in banc*

Dear Sirs:

The order of this Court dated March 12, 1964, directed that the appeal herein be reconsidered *in banc* without further argument. It is respectfully requested that this Court modify its order so as to permit the oral argument of this case for the following reasons:

1. Since this Court's order, the Supreme Court decided (on March 23, 1964) *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. , 11 L. ed 2d 804. We respectfully suggest that it might be helpful to this Court if the impact of that decision upon this case were argued orally.

Letter, Dated May 4, 1964.

2. The Government, in its brief as *amicus curiae,* took a position different from that taken by either of the parties hereto (see Government brief, pages 4-5) and the Government suggested that this case be remanded, a suggestion not made by either party. We think that it would likewise be helpful to this Court if the Government's position were made on oral argument and subject to oral refutation or rebuttal.

3. We had not previously urged that this case should be dismissed because of improper service, although the point of the propriety of service was raised by appellant in its reply brief (pages 2-4), refuted by appellee in its supplemental brief (pages 2-6) and considered by the panel of this Court who heard the case (Per Curiam opinion of January 7, 1964, note 2). Since the appellee's brief filed herewith now asks affirmance of the judgment of the District Court because of improper service, we think that this contention should likewise be made on oral argument.

For these reasons we respectfully request that the rehearing herein be set down for oral argument.

A copy of this letter has been sent to Government counsel and to counsel for the appellant.

Respectfully yours,

s/ Arthur M. Becker
Arthur M. Becker
Counsel for Appellee,
appearing specially

Stipulation.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* The Petition of PETROL SHIPPING CORPORATION as Owner of the Tanker *Atlantis*, for an order directing the KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, Charterer of said vessel, to proceed to arbitration in accordance with the terms of its written agreement.	63 Civ. 142

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned proctors for the respective parties that the motion of Petrol Shipping Corporation, Vessel-Owner-Petitioner, for an Order directing the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, to proceed to arbitration in accordance with the terms of its Agreement, returnable at a Stated Term for the hearing of motions in this Court on January 29, 1963, at 10 o'clock in the forenoon, be and the same hereby is adjourned to February 5, 1963, at the same time and place.

Dated: New York, N. Y.
January 28, 1963.

HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE,
Proctors for Petrol Shipping Corporation,
Vessel-Owner-Petitioner.

/s/ BECKER & GREENWALD
Proctors for the Kingdom of Greece, Ministry of Commerce, Purchase Directorate.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 489

KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Petitioner,*

v.

PETROL SHIPPING CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

ARTHUR M. BECKER
1701 Pennsylvania Ave., N. W.
Washington, D. C. 20006
Counsel for Petitioner.

Of Counsel:

NIXON, MUDGE, ROSE,
GUTHRIE & ALEXANDER
20 Broad Street
New York, New York

September 23, 1966.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 489

KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Petitioner,*

v.

PETROL SHIPPING CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONER'S REPLY BRIEF

Significantly, the respondent's Brief in Opposition makes no attempt to defend the ruling that the Second Circuit has power to promulgate its own *ad hoc* rule of *in personam* service in a situation where Rule 4 of the Federal Rules of Civil Procedure is silent. Nor does the respondent deny that the decision as rendered

fully warrants the consideration of this Court. Instead, respondent objects to the grant of certiorari by confusing the ruling on service with questions of sovereign immunity and consent to jurisdiction and making a belated claim of waiver of objections to service.

By opposing certiorari on grounds quite unrelated to the ruling respecting *in personam* service and to the questions and considerations advanced in the Petition, the respondent would have this Court ignore a most questionable precedent. That opinion, if left unreviewed by this Court, can generate serious intrusions upon this Court's rule-making power as well as embarrassments in the judicial and executive relationships with friendly foreign sovereigns. Such a ruling deserves the invocation of this Court's certiorari powers.

The appropriateness of the grant of certiorari is in no measure diluted by the irrelevant points advanced in the Brief in Opposition:

1. The Sovereign Immunity and Jurisdiction Points

Points I and II of the Brief in Opposition advance the contentions that (1) the Kingdom of Greece has no cognizable sovereign immunity with respect to a commercial transaction, and (2) jurisdiction was created by the agreement to arbitrate and hence service was necessary only for the purpose of notice—which purpose was here performed.

But the Second Circuit in its opinion below held those contentions irrelevant to its own determination of the propriety or availability of service under Rule 4 of the Federal Rules of Civil Procedure. As to the sovereign immunity contention, the Second Circuit

properly noted (Pet. App. 4a-5a), quoting from the *amicus* brief of the United States, that only after jurisdiction over a sovereign has been acquired by service of process does the sovereign immunity issue come into consideration. In other words, sovereign immunity "presents a ground for relinquishing the jurisdiction previously acquired" (Pet. App. 5a) through such means as proper service of process. Hence the question of service must first be resolved quite apart from sovereign immunity considerations. As was said in *Oster* v. *Dominion of Canada,* 144 F. Supp. 746, 749 (N.D.N.Y.), aff'd per curiam, 238 F. 2d 400 (C.A. 2), cert. denied. 353 U.S. 936:

> "It is beyond argument that jurisdiction of the person in this type of action is a necessary requisite to the overall jurisdiction of the Court to adjudicate the claim submitted. Such jurisdiction must be acquired either by service of process or by the defendant's appearance. *Ex parte Péru,* 318 U.S. 578, at page 587. Here the defendant has not appeared in any manner in these actions and a consideration of the effect of a holding that service upon a consul is service upon a sovereign is sufficient to conclude that the service of process here is ineffective to obtain jurisdiction over the person of the defendant.
>
> "Having arrived at the above conclusion, it would seem unnecessary to discuss and decide whether or not the immunity, ordinarily granted to a friendly sovereign, is available to the defendant in these cases. The determination of that question is not essential to this decision. . . ."

As to the jurisdictional claim, the Second Circuit properly held that "regardless, however, of what theory makes the Purchase Directorate present, service must be adequate." Pet. App. 6a. And service

must be adequate, as the court recognized, under the Federal Rules of Civil Procedure. Service under Rule 4 is made mandatory by Section 4 of the United States Arbitration Act, pursuant to which petitioner brought this action. Thus the question as to service must be considered and resolved independently of the jurisdictional factors. A court can exercise whatever jurisdiction it may have only after the defending party is properly served and brought before it.

The element of service is of necessity the primary and the critical element in this case, the element which was recognized as such by the Second Circuit and which occupied so much of its discussion in the opinion. That is the element, in terms of its treatment by the Second Circuit, that justifies the grant of certiorari.

2. The Waiver Point

Point III of the Brief in Opposition asserts that objections to service of process have long ago been waived by the petitioner. The short answer is that the Second Circuit, confronted with precisely that contention from the respondent, ignored it completely and proceeded to resolve the merits of the service of process issue.

Actually, of course, the service issue was never waived. From the earliest part of this litigation, when the Kingdom of Greece appeared specially to protest the assertion of jurisdiction over it, the propriety of service has never been conceded. The service issue came into sharp focus following the Second Circuit's *en banc* remand of the case to the District Court to take testimony, hear arguments and make a deter-

mination on precisely this question.[1] In the District Court, the parties stipulated the pertinent facts relative to the service of the petition to compel arbitration upon the petitioner, indicating that the three mailings specified in the Petition, pp. 6-7, had been made. Then, by direction of the District Court, memoranda were submitted by the parties respecting the validity of the service thus made. And the District Court then ruled on the merits of the claim that service was invalid.[2]

It was on the basis of this fully developed, stipulated record that the Second Circuit reviewed the ruling of the District Court respecting the adequacy of service and then proceeded to promulgate its own *ad hoc* rule of service to justify the "service" here effectuated. But it was not until the case reached the Second Circuit on this last occasion that the respondent for the first time raised any contention of waiver.

---

[1] The Second Circuit, sitting *en banc* upon respondent's rehearing petition and acting upon consideration of the additional briefs filed by the parties, remanded the case to the District Court "with instructions to take such evidence as is relevant to the contentions of the parties and to make a further determination in the light thereof and the arguments made thereon by the parties." 332 F. 2d at 370; Pet. App. 21a. One of the contentions raised by petitioner in its brief on rehearing, which was among those prompting this remand, was the claim (pp. 10-14 of brief) that the Kingdom of Greece had not been lawfully served with process in this case.

[2] This trial of the service question, achieved through the consent and stipulation of the respondent, eliminated any possible argument that petitioner's earlier pleadings constituted a waiver of the service issue. Rule 15(b) of the Federal Rules of Civil Procedure provides that when issues not raised in the pleadings "are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Thus the trial of the service issue precludes any claim of waiver in these circumstances. See *Joyce* v. *L. P. Steuart, Inc.*, 227 F. 2d 407 (App. D.C.); *Gibbs* v. *Randolph*, 250 F. 2d 41 (C.A. 5).

That contention was pointedly and completely ignored by the Second Circuit as it proceeded to resolve the service issue on its merits. Faced with so complete a stipulated record on the service issue, the Second Circuit had no alternative but to ignore any claim of waiver by a party who had joined in creating the record on the issue. The assertion of the waiver claim in this Court deserves no different treatment.

Only a word need be added concerning respondent's assertion (Opp. Br. 11-13) that entering into certain stipulations on behalf of the petitioner concerning extensions of the return date of the original motion constituted a general appearance and a waiver of service objections pursuant to Rule 12(h). The distinction between general and special appearances is no longer meaningful in federal practice. Professor Moore has stated (2 Moore's Federal Practice, ¶12.12 at 2263-2264, 2d ed., 1964):

> "A voluntary appearance does not waive the objection of lack of jurisdiction over the person. Obtaining extensions of time and taking depositions before answering have been held not to constitute a waiver of the defenses of lack of jurisdiction of the person and improper venue."

In sum, the respondent's belated waiver contention is invalid and cannot serve as a means of avoiding the real and substantial issues of service created by the decision of the Second Circuit.

CONCLUSION

The fact that the respondent has found it impossible to defend the ruling of the Second Circuit only underscores the appropriateness of a grant of certiorari for the reasons expressed in the Petition. Respondent's

unsupported assertion (Opp. Br. 5-6) that there has been no showing of any conflict is completely refuted by the Second Circuit's own statement (Pet. App. 11a) that it was "not disposed to follow" *Purdy Co.* v. *Argentina,* 333 F. 2d 95 (C.A. 7), regarding service on sovereigns under Rule 4. And, as the Petition more fully demonstrates, the decision below must be viewed as in total conflict with the Rules Enabling Act and with this Court's decision in *Miner* v. *Atlass,* 363 U.S. 641, respecting the power to promulgate the rule announced below. Certiorari should accordingly be granted.

Respectfully submitted,

ARTHUR M. BECKER
1701 Pennsylvania Ave., N. W.
Washington, D. C. 20006
Counsel for Petitioner.

Of Counsel:

NIXON, MUDGE, ROSE,
GUTHRIE & ALEXANDER
20 Broad Street
New York, New York

September 23, 1966.